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## STATUTES.


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IN THE

# Supreme Court of the United States

OCTOBER TERM 1941

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WALTER R. DOLLOFF, *Petitioner,*

*vs.*

UNITED STATES OF AMERICA, *Respondent.*

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## PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

Comes now the Petitioner, Walter R. Dolloff, and prays for a rehearing of his petition for a writ of certiorari heretofore filed before the Court which petition prayed that a writ of certiorari issue to review the judgment entered on the 8th day of July, 1941 in the United States Circuit Court of Appeals, Eighth Circuit in the above entitled cause and for his petition for rehearing of his said petition, states to this Honorable Court:

In presenting this matter to the Court in his petition for a writ of certiorari, the Petitioner dwelt upon two propositions:

1. That the evidence before the trial court warranted no other conclusion but that a measurement of 3.2 per cent of alcohol by weight (the quantity permitted in beverages by the laws of the State of Kansas) would always permit an intoxicating liquor to contain more than 4 per cent of alcohol by volume. (P. 6-18).

2. That Section 3 of the Liquor Enforcement Act of 1936 provided unambiguously that the Act did not protect any state from liquor violations from outside its borders unless that state prohibited all sales for beverage purposes of intoxicating liquor containing more than 4 per cent of alcohol by volume. (P. 31-40).

Relying upon the rule, many times announced by this Court, that material outside an unambiguous statute could not be used to create an ambiguity and that when the statute was plain there was nothing to construe (*United States v. Wiltberger* (5 Wheat.) 18 U. S. 76, 95-96; *Merritt v. Welsh,* 104 U. S. 694, 702-703; *Hamilton v. Rathbone,* 175 U. S. 414, 419), Petitioner treated the part of the report set out in the Circuit Court's opinion (R. 69, Para. 3; B. in Opp. 54) in its most favorable aspect from the viewpoint of the Government, i. e., in the manner in which matters are treated upon a demurrer. Petitioner, in view of the decisions of this Court mentioned above, admitted that the parenthetical insertion in the report placing the phrase *3.2 per cent of alcohol by weight* in apposition with the phrase *4 per cent of alcohol by volume,* furnished grounds for the inference that the "Committee believed * * * that a measurement of 4 per cent of alcohol by volume was identical with a measurement of 3.2 per cent of alcohol by weight". (P. 30, para. 4)

The position taken by the Government in its brief in opposition was that even though the evidence supported the conclusion asserted by the Petitioner and even though the statute was unambiguous, the Court could consult other data in determining the meaning of Section 3 of the Act. The Government cited *United States v. American Trucking Ass'ns.*, 310 U. S. 534, 543-544, which cited *Boston Sand & Gravel Co. v. United States,* 278 U. S. 41, 48.

In Boston Sand & Gravel Co. v. United States, supra, it was said:

> "It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of *persuasive* evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute." [Italics supplied.]

In view of the language of this decision, the question here is whether the Committee's report furnishes *persuasive* evidence that when Congress used the term 4 per cent by volume in the statute, it used it as synonymous with the term 3.2 per cent by weight, or what amounts to the same thing, whether Congress was laboring under the impression that the two terms provided for identical measurements.

To begin, the two terms are not the same. (R. 30-39). Placing the terms in apposition in the report suggests that the author of the report, the Committee, considered that the two terms provided for identical measure-

ments. However, the language of the report, compared with that of the statute, is informal. The report is written in the language of the layman. Informally speaking, one might refer to the two terms appositionally—they are approximately the same. But we are not to interpret a statute so as to imply thereby that Congress was ignorant of the meaning of the language it used unless in no other way can we come at the true legislative intent. (*Inhabitants of the Township of Montclair v. Ramsdell,* 107 U. S. 147.)

If the opinion of the Circuit Court herein stands, the statute has been interpreted so as to imply that Congress was ignorant of the meaning of the language which it used.

Congress had the two terms before it when it was enacting the law. This is clear from the report. There was some reason why it changed from the term "3.2 per cent by weight" of the Cullen Beer Bill to the term "4 per cent by volume" of the Liquor Enforcement Act of 1936. A measurement by volume is constant. Regardless of the ingredients in a beverage, 4 per cent by volume is always 4 parts out of every 100 parts of volume. Percentage by weight is variable. 3.2 per cent by weight varies with the ingredients in the beverage. This is the reasonable explanation for the change.

The appositional reference in the report is due, no doubt, to the feeling by the Committee of a need to explain why it was classifying states which permitted the sale of low content alcoholic beverages as "dry" states. Congress had classified alcoholic beverages containing not more than 3.2 per cent of alcohol by weight as not within the ban of the 18th Amendment by the Cullen Beer Act of 1933. It would have been a breach of faith

for Congress to have denied the protection of the Liquor Enforcement Act to states which permitted the sale of low content alcoholic beverages on the grounds that they were not dry states in view of its own Cullen Beer Bill. The two terms were approximately the same. Thus, if Congress for reasons of greater certainty, chose to adopt the volume measurement term, the states affected thereby would have no serious ground for complaint.

Therefore, Congress chose to and did adopt the 4 per cent by volume measurement advisedly and for reasons satisfactory to itself and not under any misapprehension as to the meaning of the terms. One other fact supports the conclusion that Congress wrote the Liquor Enforcement Act without any misapprehension as to the meaning of the terms. At the time the Act was enacted, there was not one state of the 48 which, without changing its laws, could qualify for protection under the Act. (*Dunn v. United States,* 98 Fed. 2d. 119). The Act made two conditions for those states which desired its protection:

1. They must prohibit all sales of alcoholic beverages containing more than 4 per cent of alcohol by volume.
2. If they permitted liquor to come into the state, they were required to establish a licensing system for such liquor.

Since any state desiring to take advantage of the Act would be required to amend its laws and since Congress apparently preferred the volume measurement and since 4 per cent by volume and 3.2 per cent by weight were nearly the same, it would appear that the true intent of the Congress as evidenced by the Liquor Enforcement

Act of 1936, was to protect only those states which co-operated to the extent of comporting to the two conditions, and that Congress was not befuddled as to the meaning of the terms when it enacted the law.

Hence, the appositional expression in the Committee's report is not *persuasive* evidence that Congress was using the term "4 per cent of alcohol by volume" with a limited meaning, nor that Congress was ignorant of the difference between the two terms.

Kansas has failed to comply with the first condition precedent and that being the only question in the case, it is respectfully submitted that the Court should grant the Petitioner a rehearing and grant the writ prayed for in the petition for certiorari.

Respectfully submitted,

L. P. BROOKS,
A. V. ROBERTS,
Of Wichita, Kansas,
*Counsel for Petitioner.*

R. BOWLAND RITCHIE,
Of Wichita, Kansas,
*Of Counsel.*

## CERTIFICATE OF COUNSEL.

The undersigned, L. P. Brooks and A. V. Roberts, counsel for the petitioner, Walter R. Dolloff, hereby certify that the foregoing petition for rehearing of petitioner's petition for a writ of certiorari is filed in good faith; that they believe same to be meritorius; and that said petition for rehearing is not filed for the purpose of delay.

L. P. BROOKS,
A. V. ROBERTS,
Of Wichita, Kansas,
*Counsel for the Petitioner.*